

Digital Evidence at Trial in India: Challenges Regarding The Reliability of Electronic Documents

Dr KVK Santhy¹

ABSTRACT:- How to admit electronic evidence to decide cases has become a major conundrum in Indian judicial practice. As a new branch of evidence with high technology, digital evidence has been playing an increasingly important role in solving legal disputes. In the meantime, it has also brought variety of issues and challenges into the legal system regarding evidence, such as how to search, seize and preserve digital evidence, how to analyse, review and digital evidence, and more importantly, how to effectively decide cases based on electronic evidence.

Digital evidence or electronic evidence is any probative information stored or transmitted in digital form that a party to a court case may use at trial. Before accepting digital evidence a court will determine if the evidence is relevant, whether it is authentic, if it is hearsay and whether a copy is acceptable or the original is required. Before accepting digital evidence a court will determine if the evidence is relevant, whether it is authentic, if it is hearsay and whether a copy is acceptable or the original is required.

E-Evidence is found in e-mails, digital photographs, ATM transaction logs, word processing documents, instant message histories, files saved from accounting programs, spreadsheets, internet browser histories, databases etc.

The courts were sceptical in admitting the digital evidence in the very beginning. But slowly they started admitting the same and gave them the status of corroboratory evidence. The opinion of Indian Judiciary at that point of time is that digital evidence is very much fragile and is prone to manipulation. Indian courts in number of cases opined that Digital Evidence tends to be more voluminous, easy to destroy, easily modified and duplicated, potentially more expressive, and more readily available.

I) INTRODUCTION :

A new branch of forensics has developed and helped in bringing authenticity to the electronic or digital evidences found in computers and digital storage mediums. The goal of computer forensics is to explain the current state of a digital artifact which can include a computer system, storage medium (hard disk or CD-ROM), an electronic document (e.g. an email message or JPEG image) or even a sequence of packets moving over a computer network.

Computer forensics is a branch of forensic science pertaining to legal evidence found in computers and digital storage mediums. Computer forensics is also known as digital forensics. The goal of computer forensics is to explain the current state of a digital artifact. The term digital artifact can include, a computer system, storage medium (hard disk or CD-ROM), an electronic document (e.g. an email message or JPEG image) or even a sequence of packets moving over a computer network.

II) DEVELOPMENT OF LAW RELATING TO ELECTRONIC EVIDENCE:

The information and Technology Act, 2000 authenticated or recognized all kinds of electronic evidences. The definition of 'documentary evidence' has been amended to include all documents, including electronic records produced for inspection by the court. Section 3 of the Evidence Act, was amended to the effect that all electronic documents, records were given a legal status of evidence.

The Information Technology Act is based on the United Nations Commission on International Trade Law (UNCITRAL) model Law on Electronic Commerce.

¹ Associate Professor, NALSAR University of Law, Hyderabad. Email: santhy@nalsar.ac.in.

Amendments to the Indian Evidence Act 1872, the Indian Penal Code 1860 and the Banker's Book Evidence Act 1891 provides the legislative framework for transactions in electronic world. The definition of 'evidence' has been amended to include electronic records. The definition of 'documentary evidence' has been amended to include all documents, including electronic records produced for inspection by the court. Section 3 of the Evidence Act, 1872 defines evidence as under:

"Evidence" - Evidence means and includes:-

1)-----

“2) all documents including electronic records produced for the inspection of the court.”

The term 'electronic records' has been given the same meaning as that assigned to it under the IT Act. The Act provides defines it as "data, record or data generated, image or sound stored, received or sent in an electronic form or microfilm or computer-generated microfiche". The definition of 'admission'² has been changed to include a statement in oral, documentary or electronic form which suggests an inference to any fact at issue or of relevance. New Section 22A³ has been inserted into Evidence Act to provide for the relevancy of oral evidence regarding the contents of electronic records. It provides that oral admissions regarding the contents of electronic records are not relevant unless the genuineness of the electronic records produced is in question.

III. ISSUE OF PRIMARY AND SECONDARY EVIDENCE VIS-À-VIS ELECTRONIC EVIDENCE:

According to Section 61 of IEA, contents of documents may be proved either by Primary or by Secondary evidence. As per section 62 Primary Evidence means the document itself produced for the inspection of the Court.

When the question regarding submission of primary or secondary evidence in relation to electronic documents arises, Section 65A provides that the contents of electronic records may be proved in accordance with the provisions of Section 65B. as per the general rule laid down in the Indian Evidence Act every document shall be proved with the help of primary evidence⁴. Therefore acceptance of Secondary Evidence is only an exceptional provision which is subjected to the conditions mentioned in Section 65.⁵

² **Section 17 in The Indian Evidence Act, 1872:** Admission defined.—An admission is a statement, 1[oral or documentary or contained in electronic form], which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned. Comment s Admissibility is substantive evidence of the fact Admissibility is substantive evidence of the fact admitted while a previous statement used to contradict a witness does not become substantive evidence and merely serves the purpose of throwing doubt on the veracity of the witness.

³ **Section 22A in The Indian Evidence Act, 1872:** 1[22A. When oral admissions as to contents of electronic records are relevant.—Oral admissions as to the contents of electronic records are not relevant, unless the genuineness of the electronic record produced is in question.]

⁴ Sec 64

● ⁵ Secondary evidence may be given of the existence, condition or contents of a document in the following cases:

- (a) When the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person **out of reach of**, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in Section 66, such person does not produce it;
- (b) When the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;
- (c) When the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;
- (d) When the original is of such a nature as not to be **easily movable**;
- (e) When the original is a public document within the meaning of Section 74;
- (f) When the original is a document of which a certified copy is permitted by this Act, or by any other law in force in India to be given in evidence;
- (g) When the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collections.

Any electronic document whether it is primary or secondary is not humanly readable. Court cannot take a view of its own because the document is written in binary language and readable only in a binary reading device i.e., a computer. Hence according to one view Electronic Documents are to be always produced only with another human being providing a written testimony to what the document contains and the discussion regarding the “primary” and “Secondary” nature of documents in electronic form is practically of not any use.

Section 65B of Indian Evidence Act indicates the manner in which a certificate has to be produced in order to make an electronic document admissible in a Court. It is not necessary to discuss whether it is admissible as a “Primary” document or a “Secondary” document.

When the hard disk that is taken out of a computer and said to contain an electronic document, it is only a “Container” of an “Electronic Document” and not the electronic document itself. It applies even to a CD which contains only one document which is under reference of the Court. The subject document can only be read by a human being when the “container” is connected to a compatible electro mechanical device namely the “Computer System” and read through an operating system such as Windows with an application such as “Microsoft word”. Even if the Judge fixes a computer in the Court room and himself reads the document, his reading is dependent on the device called the “Computer”, the operating system and the application which should be functioning normally. Hence an electronic document has to be always certified to the effect that this is what the document means when read in a computer with appropriate application running in an appropriate operating system”. The person who provides the certification assists the Court like an “Expert”. This has been recognized and implemented in the Section 65A calling itself as “Special Provision” and indicating the certification process under “Section 65B”

III) The Core Law relating to admission of electronic evidence:

Section 65B provides that notwithstanding anything contained in the Evidence Act, any information contained in an electronic record, is deemed to be a document and is admissible in evidence without further proof of the original's production, provided that the conditions set out in Section 65B are satisfied.

Section 65B(1) states that if any information contained in an electronic record produced from a computer (known as computer output) has been copied on to a optical or magnetic media, then such electronic record that has been copied 'shall be deemed to be also a document' subject to conditions set out in Section 65B(2) being satisfied.

Both in relation to the information as well as the computer in question such document 'shall be admissible in any proceedings when further proof or production of the original as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.'

The conditions specified in Section 65(B)(2) are:

1. Firstly, the computer output containing the information should have been produced by the computer during the period over which the computer was used regularly to store or process information for the purpose of any activities regularly carried on over that period by the person having lawful control over the use of the computer.
2. The second requirement is that it must be shown that during the said period the information of the kind contained in electronic record or of the kind from which the information contained is derived was 'regularly fed into the computer in the ordinary course of the said activity'.
3. A third requirement is that during the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time that break did not affect either the record or the accuracy of its contents.
4. The fourth requirement is that the information contained in the record should be a reproduction or derived from the information fed into the computer in the ordinary course of the said activity.

Under Section 65B(4) the certificate which identifies the electronic record containing the statement and describes the manner in which it was produced giving the particulars of the device involved in the production of that record and deals with the conditions mentioned in Section 65(B)(2) and is signed by a person occupying a responsible official position in relation to the operation of the relevant device 'shall be evidence of any matter stated in the certificate'.

IV) JUDICIAL RECOGNITION OF ELECTRONIC EVIDENCES:

Slowly courts have started accepting evidences recorded digitally. For instance in *Amitabh Bagchi Vs. Ena Bagchi*⁶ the court held that the physical presence of person in Court may not be required for purpose of adducing evidence and the same can be done through medium like video conferencing.

*State of Maharashtra v Dr Praful B Desai*⁷ involved the question whether a witness can be examined by means of a video conference. The Supreme Court observed that video conferencing is an advancement of

science and technology which permits seeing, hearing and talking with someone who is not physically present with the same facility and ease as if they were physically present. The legal requirement for the presence of the witness does not mean actual physical presence. The court allowed the examination of a witness through video conferencing and concluded that there is no reason why the examination of a witness by video conferencing should not be an essential part of electronic evidence.

In *Tomaso Bruno and Anr. v. State*⁸ of Uttar Pradesh, a three-Judge Bench observed that “advancement of information technology and scientific temper must pervade the method of investigation. Electronic evidence was relevant to establish facts. Scientific and electronic evidence can be a great help to an investigating agency”.

V) **Presumption in Law vis-vis Electronic Record:**

In any proceedings involving a secure electronic record, the court shall presume, unless contrary is proved, that the secure electronic record has not been altered since the specific point of time, to which the secure status relates. The law also presumes that in any proceedings, involving secure digital signature, the court shall presume, unless the contrary is proved, that the secure digital signature is affixed by the subscriber with the intention of signing or approving the electronic record⁹.

VI) **Judicial Interpretation of Sec 65 A and 65B:**

In *Bodala Murali Krishna Vs. Smt. Bodala Prathima*¹⁰ the court held that, “...the amendments carried to the Evidence Act by introduction of Sections 65-A and 65-B are in relation to the electronic record. Sections 67-A and 73-A were introduced as regards proof and verification of digital signatures. As regards presumption to be drawn about such records, Sections 85-A, 85-B, 85-C, 88-A and 90-A were added. These provisions are referred only to demonstrate that the emphasis, at present, is to recognize the electronic records and digital signatures, as admissible pieces of evidence.”

In *Dharambir v Central Bureau of Investigation*¹¹, the court arrived at the conclusion that when Section 65B talks of an electronic record produced by a computer referred to as the computer output) it would also include a hard disc in which information was stored or was earlier stored or continues to be stored.

It distinguished as there being two levels of an electronic record. One is the hard disc which once used itself becomes an electronic record in relation to the information regarding the changes the hard disc has been subject to and which information is retrievable from the hard disc by using a software programme.

The other level of electronic record is the active accessible information recorded in the hard disc in the form of a text file, or sound file or a video file etc. Such information that is accessible can be converted or copied as such to another magnetic or electronic device like a CD, pen drive etc.

Even a blank hard disc which contains no information but was once used for recording information can also be copied by producing a cloned had or a mirror image.

In *State (NCT of Delhi) v Navjot Sandhu*¹², there was an appeal against conviction following the attack on Parliament on December 13 2001. This case dealt with the proof and admissibility of mobile telephone call records.

While considering the appeal against the accused for attacking Parliament, a submission was made on behalf of the accused that no reliance could be placed on the mobile telephone call records, because the prosecution had failed to produce the relevant certificate under Section 65B(4) of the Evidence Act.

The Supreme Court concluded that a cross-examination of the competent witness acquainted with the functioning of the computer during the relevant time and the manner in which the printouts of the call records were taken was sufficient to prove the call records.

In *Jagjit Singh v State of Haryana*¹³ the speaker of the Legislative Assembly of the State of Haryana disqualified a member for defection. While hearing the matter, the Supreme Court considered the appreciation of digital evidence in the form of interview transcripts from the Zee News television channel, the Aaj Tak television channel and the Haryana News of Punjab Today television channel. The court determined that the electronic evidence placed on record was admissible and upheld the reliance placed by the speaker on the recorded interview when reaching the conclusion that the voices recorded on the CD were those of the persons taking action. The Supreme Court found no infirmity in the speaker's reliance on the digital evidence and the

⁷ AIR 2003 SC 2053.

⁸ MANU/SC/0057/2015: (2015) 7 SCC 178.

⁹ *Society Des products Nestle SA case* 2006 (33) PTC 469 & *State v Mohd Afzal*, 2003 (7) AD (Delhi)1.

¹⁰ (2007 (2) ALD 72)

¹¹ (148 (2008) DLT 289)

¹² (AIR 2005 SC 3820).

¹³ (2006) 11 SCC 1

conclusions reached by him. The comments in this case indicate a trend emerging in Indian courts: ie, judges are beginning to recognize and appreciate the importance of digital evidence in legal proceedings.

In *Twentieth Century Fox Film Corporation v. NRI Film Production Associates (P) Ltd.*¹⁴ certain conditions have been laid down for video-recording of evidence:

- “1. Before a witness is examined in terms of the Audio-Video Link, witness is to file an affidavit or an undertaking duly verified before a notary or a Judge that the person who is shown as the witness is the same person as who is going to depose on the screen. A copy is to be made available to the other side. (Identification affidavit).
2. The person who examines the witness on the screen is also to file an affidavit/undertaking before examining the witness with a copy to the other side with regard to identification.
3. The witness has to be examined during working hours of Indian Courts. Oath is to be administered through the media.
4. The witness should not plead any inconvenience on account of time different between India and USA.
5. Before examination of the witness, a set of plaint, written statement and other documents must be sent to the witness so that the witness has acquaintance with the documents and an acknowledgement is to be filed before the Court in this regard.
6. Learned Judge is to record such remarks as is material regarding the demur of the witness while on the screen.
7. Learned Judge must note the objections raised during recording of witness and to decide the same at the time of arguments.
8. After recording the evidence, the same is to be sent to the witness and his signature is to be obtained in the presence of a Notary Public and thereafter it forms part of the record of the suit proceedings.
9. The visual is to be recorded and the record would be at both ends. The witness also is to be alone at the time of visual conference and notary is to certificate to this effect.
10. The learned Judge may also impose such other conditions as are necessary in a given set of facts.
11. The expenses and the arrangements are to be borne by the applicant who wants this facility.”

VII) Relevancy and admissibility of the Electronic Evidence:

In *Kundan Singh Vs. The State*, the genuineness of mobile records was called in question. The CDR copy was retrieved from archives of the company but was not stamped¹⁵. The computer output submitted shall satisfy the conditions laid down in Sub clause 4 of Sec 65¹⁶.

Another controversy was also clarified regarding the issue of whether the certificate issued under Sec 65 shall be issued along with the submission of evidence or during the trial when the person is called for Evidence. In *Anwar P.V. (S) versus P.K. Basheer*¹⁷ and *Others*, the Supreme Court has held that the certificate shall accompany the electronic record such as print out “,

The supreme court referred to *Anwar P.V. Basheer* wherein it noticed the difference between relevancy and admissibility, which is examined at the initial stage; and genuineness, veracity and reliability of the evidence, which is seen by the court subsequently or in the second stage.

In *Ram Singh and Ors. v. Col. Ram Singh*¹⁸, a Three-Judge Bench considered the said issue. The court felt that “it will be wrong to deny to the law of evidence advantages to be gained by new techniques and new devices, provided the accuracy of the recording can be proved. Such evidence should always be regarded with

¹⁴ (AIR 2003 Kant 148)

¹⁵ [MANU/DE/3674/2015]

¹⁶ “The certificate under sub-section (4) to Section 65B must state the following:

- (a) Identify the electronic record by identifying the statement, i.e., "computer output" in form of paper print out or copied, recorded or stored optical or magnetic media.
- (b) Particulars of the device involved in the production of that electronic record to show that the electronic record was produced by the computer; and
- (c) State that the computer output contains information, which was stored or fed into the computer over the stated period when computer was regularly used to store or process information, and that the computer output consists of information or data or is derived from information regularly fed into the computer in ordinary course of such activities.
- (d) The certificate should also state as required by sub-clause (c) to sub-section (2) that the computer was during the relevant periods was operating properly and if it was not operating properly during the period or a part of the said period, it had not affected the electronic record or accuracy thereof.”

¹⁷ [MANU/SC/0834/2014].

¹⁸ MANU/SC/0176/1985: 1985 (Supp) SCC 611.

some caution and assessed in the light of all the circumstances of each case. Electronic evidence was held to be admissible subject to safeguards adopted by the Court about the authenticity of the same.”

In *Shafhi Mohammad vs. The State of Himachal Pradesh*¹⁹ one of the questions which arose during the trial whether videography of the ‘scene of crime’ or ‘scene of recovery’ during investigation should be necessary to inspire confidence in the evidence collected. The court overruled its decision rendered in *Navjotsingh Sandhu* and held that “The applicability of procedural requirement Under Section 65B(4) of the Evidence Act of furnishing certificate is to be applied only when such electronic evidence is produced by a person who is in a position to produce such certificate being in control of the said device and not of the opposite party. In a case where electronic evidence is produced by a party who is not in possession of a device, applicability of Sections 63 and 65 of the Evidence Act cannot be held to be excluded. In such case, procedure under the said Sections can certainly be invoked. If this is not so permitted, it will be denial of justice to the person who is in possession of authentic evidence/witness but on account of manner of proving, such document is kept out of consideration by the court in absence of certificate Under Section 65B(4) of the Evidence Act, which party producing cannot possibly secure. Thus, requirement of certificate Under Section 65B(h) is not always mandatory”.

In *Arjun Panditrao Khotkar vs. Kailash Kushanrao Gorantyal and Ors*²⁰. The video recording in the election commission office was submitted as evidence which was duly certified by the concerned officer. The court held that “ the certificate required Under Section 65B(4) is a condition precedent to the admissibility of evidence by way of electronic record, as correctly held in *Anvar P.V.* , and incorrectly "clarified" in *Shafhi Mohammed*. Oral evidence in the place of such certificate cannot possibly suffice as Section 65B(4) is a mandatory requirement of the law.” Section 65B(4) of the Evidence Act clearly states that secondary evidence is admissible only if lead in the manner stated and not otherwise. To hold otherwise would render Section 65B(4) otiose”.

The majority judgment given by J. Rama Subramaniam and J. Rohinton clarified the position of law regarding the admissibility of primary and secondary electronic evidence. The majority view is “The evidence relating to electronic record, as noted hereinbefore, being a special provision, the general law on secondary evidence Under Section 63 read with Section 65 of the Evidence Act shall yield to the same. ‘*Generalia specialibus non derogant*’, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65-A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65-A and 65-B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this Court in *Navjot Sandhu* case, does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements Under Section 65-B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65-B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible”.

So the Supreme court has finally laid the controversy to rest by saying that Original evidence is admissible U/s 62, Certificate U/s 65B is mandatory for secondary evidence, 65B(2) to be complied, Certificate U/s 65B cannot be substituted by the statement of the witness. It also clarified that in a criminal trial, Certificate U/s 65B is to be filed before the start of trial but in appropriate cases, the certificate U/s 65B can be produced at a later stage. Judge is given a discretion to produce fresh 65B in place of defective certificate. Court U/s 91 or 311 Cr. P.C. or 165 Evidence Act, can direct the party possessing the original evidence to produce the certificate U/s 65B.

In case of CDR, the opposite party cannot challenge the veracity of the evidence if the same is destroyed, so direction be issued to the companies to preserve the evidence for production during trial.

VIII) Admissibility of Oral Evidence on Electronic Evidence:

Arjun Pandit’s judgment discussed about the above said issue and tried to provide a clarification on when a “Oral Admission” may be relevant as well as the application of Section 45A the role of a Digital Evidence Examiner referred to under Section 79A²¹. The Judgment referred to Section 22A of IEA which stated

¹⁹ MANU/SC/0058/2018

²⁰ MANU/SC/0521/2020

²¹ **Section 79A in The Information Technology Act, 2000**

96 [79A Central Government to notify Examiner of Electronic Evidence. -The Central Government may, for the purposes of providing expert opinion on electronic form evidence before any court or other authority

“Oral admissions as to the contents of electronic records are not relevant, unless the genuineness of the electronic record produced is in question.” It also referred to Section 45A according to which the opinion of Digital Evidence Examiner (under Section 79A-When appointed) is relevant only when the genuineness of an already admitted electronic evidence is in question.

The supreme court finalised the conditions for the admissibility under Section 65B(4) of the Evidence Act. The following are the important points to be followed :

- “
- (a) There must be a certificate which identifies the electronic record containing the statement;
 - (b) The certificate must describe the manner in which the electronic record was produced;
 - (c) The certificate must furnish the particulars of the device involved in the production of that record;
 - (d) The certificate must deal with the applicable conditions mentioned Under Section 65B(2) of the Evidence Act; and
 - (e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.”

CONCLUSION:

Courts in India have discussed at length about the admissibility of electronic records. They tried to apply rules of evidence which are applied to normal civil or criminal proceedings and juxtaposed with the special law relating to the electronic records as envisaged in Sec 65 A and 65B. In order to help the person who is genuine victim but doesn't have the original electronic evidence with him courts have tried to do justice to him by relaxing the rule of submitting the certification along with the proof of evidence. They said that unless the genuineness is in question there is no necessity to produce the certificate duly signed by the examiner. But finally in Arjun Pandit's case the Supreme court clarified the position and said that its mandatory to submit the certificate along with proof electronic record to admit the same as evidence.

Dr KVK Santhy

¹Associate Professor, NALSAR University of Law, Hyderabad.

specify, by notification in the Official Gazette, any Department, body or agency of the Central Government or a State Government as an Examiner of Electronic Evidence. Explanation. -For the purposes of this section, "electronic form evidence" means any information of probative value that is either stored or transmitted in electronic form and includes computer evidence, digital audio, digital video, cell phones, digital fax machines.]